



THE STATE

OF WYOMING

MIKE SULLIVAN
GOVERNOR

Board of Control

February 26, 1988

RECEIVED

MAR 02 1988

WATER RIGHTS
SALT LAKE

Mr. Bob Leake
Division of Water Rights
152 East 100 North
Vernal, Utah 84070

RE: Beaver Creek Meeting

Dear Bob;

At yesterday's meeting a discussion was held on how valid Utah water rights on the lower reaches of the West Fork might be addressed. Enclosed find a Wyoming attorney general's opinion regarding a similar situation. While, as we discussed, the opinion probably has no validity in Utah, it might be helpful in your analysis of the problem.

Best Regards,

A handwritten signature in cursive script that reads "Mike".

Mike Ebsen

cc: file
Lee Sim ✓
Division of Water Rights
1636 W. North Temple
Salt Lake City, Utah 84116

July 27, 1965

OPINION 34

TO: Floyd A. Bishop
State Engineer

BY: Thomas E. Cahill
Special Assistant Attorney General

QUESTION: May a water appropriator enter upon lands of another to repair waterways so that his water will reach his headgate?

ANSWER: Yes.

FACTS

Spring floods caused a stream to change its channel so that an appropriator's headgate was rendered useless. The appropriator desired to enter upon another's lands to repair the channel, but the owner has refused him that right. The Water Division Superintendent has requested an opinion on the problem.

DISCUSSION

It is a general rule that when a person has a property right, they also have a right to protect that property. There is no doubt that a water right is a property right and courts are unanimous in so holding. Reasonable protection of a water appropriation includes the right to insure that the water will reach the point of diversion of the appropriator.

2 Kinney on Irrigation and Water Rights, 1520, (2d ed. 1912) states:

"Where a person has acquired the right to a certain amount of water in a stream by the appropriation of the same, he also acquires the right to have that water flow in the natural stream and over the lands of others down to the head of his ditch. The appropriation of the water also carries with it an implied authority to do all that may become necessary to secure the benefit of the appropriation. He therefore has the right to enter the bed of the stream above the head of his ditch, even on the lands of others, and to remove sediment or obstructions which may have changed or obstructed the course of the current so as to prevent it from flowing down to and entering his ditch. Thus to this extent the appropriator acquires an easement in the lands through which the stream flows; but the right thus acquired is one which must be held to the narrowest limits compatible with the principal right, which is the use of the water. No unnecessary injury must be done to the lands of another in making the change, or the making it will be liable in damages."

This is the accepted view and is also followed by Wiel in "Water Rights in the Western States" 488 (3rd, 1911) wherein it is said:

"As in the case of any easement, the ditchowner, as the dominant, has the duty of keeping the ditch in repair, and not the landowner. Correspondingly, he has a right of entry upon the servient estate to make the repairs and to clean out the ditches, and if the landowner interferes, injunction lies."

The Wyoming Supreme Court has adopted this view, and in *Willey v. Decker*, 11 Wyo. 496, 544 (1903) it is stated:

"That a valid appropriation of water from a natural stream constitutes an easement in the stream, and that such easement is an incorporeal hereditament, the appropriation being in perpetuity, cannot be disputed.***He is an appropriator from the natural stream, through the intermediate agency of the ditch, and has the right to have the quantity of water so appropriated flow in the natural stream, and through the ditch for his use."

Therefore, by the above authorities, it is seen that an appropriator of water has the right to enter upon lands of another to repair a flood-damaged stream channel to allow water under his appropriation to reach his headgate.

August 6, 1965

OPINION 35

TO: John W. Pattno
Laramie County Attorney

BY: Lawrence E. Johnson
Assistant Attorney General

QUESTION: May a Clerk of Court use a rubber stamp "Seal" in lieu of the standard court seal which leaves an impression upon the instrument so sealed?

ANSWER: No.

FACTS

The Clerk of Court of one of the District Courts of the State of Wyoming proposes to use a rubber stamp type seal in lieu of the traditional court seal which leaves an impression upon the document itself. The Clerk of Court has requested that the County Attorney obtain an opinion from our offices relative to the propriety and legality of this procedure.

STATUTES

W.S. 1957, Sec. 5-50, Sec. 5-53, Sec. 5-61 and Sec. 34-57.